

ERA Forum (2020) 20:531–547
<https://doi.org/10.1007/s12027-019-00591-9>

ARTICLE



Social security coordination after Brexit: trying to take an egg out of an omelette?

Simon Roberts¹



Published online: 13 December 2019
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Abstract This article examines the negotiations to secure social security and health-care rights after Brexit for people who have exercised their right to free movement or move between the EU and UK in the future. The analysis is based upon examination of drafts of the Withdrawal Agreement informed by interviews with senior policy makers involved in the Brexit negotiations. The article finds that while persons and benefits included in the Withdrawal Agreement mirror those of the current Coordinating Regulations the procedure for identifying eligibility is complicated and future arrangements might not provide comprehensive coverage and legal certainty.

Keywords European Union · Social security coordination · Brexit negotiations

1 Introduction

The coordination of social security and healthcare in the European Union (EU) in the context of free movement of workers and citizens was at the centre of the debate in the lead up to the Referendum on 23 June 2016 in which the United Kingdom (UK) voted by a narrow margin to leave the EU.¹ Almost one year later, on 29 March 2017, the UK Government invoked Article 50 of the Treaty on European Union² to initiate the process of leaving, which triggered a two-year negotiating window that ended on 29 March 2019. At the beginning of 2019, Theresa May, the then UK Prime Minister,

¹ *Electoral Commission* [8].

² Article 50 of the Treaty on European Union. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal C 326, 26.10.2012.

✉ Dr S. Roberts
simon.roberts@nottingham.ac.uk

¹ University of Nottingham, Nottingham, UK

was unable to get sufficient support in Parliament for the Withdrawal Agreement³ she had negotiated with the other 27 Member countries, and the EU agreed to put the deadline for the UK to leave back from 29 March to 12 April and then to 31 October 2019.

On 8 February 2017, the UK House of Commons Select European Scrutiny Committee asked

“the Minister to clarify how the Government will seek to secure a new arrangement with the EU or individual Member States on coordination of social security to replace, in whole or in part, the substance of the existing Regulations when the UK ceases to be a Member State.”⁴

This article examines the process to secure a new arrangement including what has been agreed in the Withdrawal Agreement⁵ with respect to the coordination of social security and healthcare rights for people who have exercised their right of free movement between the UK and the EU27 at the time of the UK’s withdrawal, and future scenarios for coordination including in the event of a ‘No deal’ Brexit. The analysis is part of a longitudinal study⁶ based upon examination of iterations of the draft Withdrawal Agreement⁷ guided and informed by seven interviews⁸ with senior policy makers involved in the Brexit negotiations in five EU member countries between July 2017 and July 2019—Austria (2017, 2018), Finland (2017, 2019), Poland (2019), Spain (2017) and the United Kingdom (2018). The selection of countries is purposive based upon migration stocks and flows,⁹ and social security systems.¹⁰ The article finds that while the persons and benefits included in social security coordination under the Withdrawal Agreement mirror those of the current Coordinating Regulations¹¹ the procedure for identifying eligibility is complicated by the interface between the past and the future, and future arrangements might not provide comprehensive coverage and legal certainty for people who have already exercised their

³Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators’ level on 14 November 2018.

⁴*House of Commons*, [23].

⁵Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators’ level on 14 November 2018.

⁶*Roberts* [39].

⁷Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators’ level on 14 November 2018.

⁸Ethical clearance for the study was approved by the relevant University of Nottingham Research Ethics Committee.

⁹European Commission, 2018 Report on intra-EU Labour Mobility 8.2.2019; Office for National Statistics, Living abroad: British residents living in the EU: April 2018; *EC* [11]; *Office for National Statistics* [34].

¹⁰*Esping-Andersen* [10]; *Ferrera* [15].

¹¹Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems; OJ L 166, 30.4.2004 and Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems OJ L 284/1 30.10.2009.

right to free movement or may move between the UK and EU in the future. The article contributes to literature on EU law and policy on coordination of social security and healthcare, policy design and governance, and the UK and EU's approaches to the negotiations.

2 Brexit ubiquity

There is a growing body of multidisciplinary academic literature on Brexit and free movement that, reflecting its all-encompassing nature for the UK, ranges across policy fields and uses methods from legal and policy analysis to ethnography. This literature examines the potential threat to the UK's continuing existence as a nation state posed by free movement across the Ireland-Northern Ireland border in the context of the Belfast ('Good Friday') Agreement;¹² the potential impact of reduced EU migration on the UK economy;¹³ citizenship rights after Brexit,¹⁴ including the implications of various Brexit scenarios for free movement¹⁵ and the rights, including the social security and healthcare rights, at stake for those people who have moved between the UK and the EU27.¹⁶ Harris suggests that "*greater national legislative autonomy*" in the UK after Brexit "*poses ... uncertainties for current and future migrants regarding social protection ... and reduced opportunities for UK social security law to be exposed to the influence of external judicial scrutiny.*"¹⁷ Guild, suggests that Brexit may result in a "*bonfire of social security rights*" for British and EU27 citizens.¹⁸ Others have reminded us of how Brexit uncertainty is impacting on workers, families and children who have made their homes in the UK.¹⁹

3 What is social security coordination and why it matters

EU member countries' social security schemes are coordinated to reduce the barriers that national social security rules, specifically nationality, residence, contribution and presence conditions, might otherwise present to people exercising their right to free movement.²⁰ Originally provided for workers by the Treaty of Rome²¹ and Regula-

¹²Belfast Agreement 10.4.1998: <https://www.gov.uk/government/publications/the-belfast-agreement>. Birrell and Gray [1]; McCrudden [33]; Temple Lang [43].

¹³Portes/Forte [37]; Wadsworth [45].

¹⁴Porchia [38].

¹⁵Wray [47]; Dhingra/Sampson [5]; Emerson [9].

¹⁶Peers [36]; House of Commons [26]; Machin [31]; Mazars [32]; Bräuninger [2]; House of Commons [25] (26 August 2016); Guild [17]; House of Commons [27] (19 January 2017); Roberts; Verschuieren [44].

¹⁷Harris [18], p. 23.

¹⁸Guild [17], p. 5.

¹⁹Zontini/Pero [48].

²⁰Holloway [22].

²¹Traité instituant la Communauté Economique Européenne <https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:11957E/TXT&from=EN>.

tions 3/58 and 4/58 to support free movement of labour; following the introduction of the concept of European Citizenship by the Maastricht Treaty, social security and healthcare is today coordinated for mobile workers and citizens by Regulation (EC) No 883/2004²² and its implementing Regulation (EC) No 987/2009²³ (the ‘Coordinating Regulations’). The Regulations employ four principle mechanisms to coordinate social security in the context of free movement: ‘Equal treatment’ prohibits discrimination on grounds of nationality; rules determine which country is responsible for collecting social insurance, determining eligibility to and payment of benefits and delivery of services; aggregation of periods of insurance, residence or employment spent in different EU member countries to establish an entitlement to benefit; and exportability of some, mainly long term, benefits.²⁴ At the beginning of the new millennium, Eichenhofer wrote:

“The co-ordination of social security between Member States has been the most significant development so far in social policy at the European level. Its success has been remarkable, yet its implementation has been scarcely noticeable. For decades, pensions have been ‘exported’, medical treatment has been available for tourists travelling between Member States, and pro-rata pensions have been payable to those who have spent their working lives in more than one Member State. Such benefits of EU social security co-ordination are today taken for granted.”²⁵

In 2014, the UK Government’s review of free movement of persons expressed a similar view of the value of social security coordination:

“These provisions are of significant benefit to UK citizens, particularly retirees, who are living in other Member States.”²⁶

4 The role of social security coordination in the Brexit narrative

While at the turn of the Millennium, Eichenhofer could say that social security coordination “*has been scarcely noticeable*” it took centre stage in the Brexit narrative, in which, despite the evidence to the contrary,²⁷ numerous inaccuracies, including the myth of ‘benefit tourism’, gained traction to create a ‘moral panic’.²⁸ By 2015, the previously arcane principle of social security coordination had risen to top priority amongst UK voters’ concerns. A national opinion poll reported by Ipsos Mori

²²Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems; OJ L 166, 30.4.2004.

²³Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems OJ L 284/1 30.10.2009.

²⁴Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems; OJ L 166, 30.4.2004.

²⁵Eichenhofer [7].

²⁶H.M. Government [21], p. 41.

²⁷Dustmann/Frattini [6]; ICF GHK [28].

²⁸Cohen [3].

on 9 October 2015 found that 58% of respondents “believe there should be greater restrictions on free movement of EU citizens”, while 14% “believe there should be no right to free movement between EU countries at all.” Fifty-nine percent of those who said they wanted more restriction on free movement cited “*people coming to claim benefits as their reason*.” Nearly two-thirds of British voters described achieving the objective of restricting EU migrants’ entitlement to UK benefits as “important”.²⁹

David Cameron, the then UK Prime Minister, succeeded in renegotiating elements of social security coordination to allow the UK to have an ‘emergency brake’ to restrict newly arrived EU workers’ access to in-work benefits for up to four years; remove any obligation to pay the means-tested unemployment benefit, Income-based Jobseeker’s Allowance, to EU jobseekers; and remove payment of Child Benefit at UK rates to EU nationals in the UK for children living in another member country.³⁰ Although the Ipsos Mori poll had suggested that the outcome of Cameron’s negotiations in this area may be decisive to the outcome of the Referendum, what he achieved, described by the current Prime Minister, Boris Johnson, as “two thirds of dilly squat”,³¹ failed to convince the British electorate.

5 Coordination of social security: what has been agreed?

5.1 The negotiations

On 29 March 2017, the UK government invoked Article 50 of the Treaty on European Union³² to trigger a two-year negotiating window scheduled to end with the UK’s departure on 29 March 2019. The European Council appointed the European Commission (Commission) to negotiate the Withdrawal Agreement³³ on behalf of the EU27 and negotiations on the terms of the UK’s withdrawal began on 19 June 2017.³⁴ The negotiations were divided into two phases. The First phase contained the three elements considered to be priorities: Citizens’ rights; Financial settlement; and the Irish border. Citizens’ rights include free movement and social security coordination. Moving to phase 2, which covered the post-Brexit (and Transitional) relationship, was conditional on the European Council³⁵ considering that sufficient progress had been made on phase 1.

²⁹Ipsos Mori [29].

³⁰H.M. Government [20]; House of Commons [24].

³¹ITV News [30].

³²Article 50 of the Treaty on European Union. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal C 326, 26/10/2012.

³³Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators’ level on 14 November 2018.

³⁴European Commission [12].

³⁵The European Council brings together EU leaders to set the EU’s political agenda. It represents the highest level of political cooperation between EU countries: https://europa.eu/european-union/about-eu/institutions-bodies/european-council_en.

The Joint report³⁶ on progress on the three priority issues during phase 1 of the negotiations was published by the EU and UK on 8 December 2017 prior to the meeting of the European Council (Article 50) of 14–15 December 2017.³⁷ The Joint report was drafted into legal terms and published as the draft Withdrawal Agreement on 28 February 2018³⁸ with an amended version, with areas of agreement highlighted in green, following on 19 March.³⁹ The whole of social security coordination was highlighted green in the March 2018 draft, showing agreement between the Parties. With some minor amendments to text and numbering, the section in the March draft concerned with social security coordination became that part of the draft Withdrawal Agreement⁴⁰ published on 14 November 2018 which, together with a 26-page Political Declaration on a Future Framework,⁴¹ was endorsed by EU leaders at a specially convened European Council meeting on 25 November 2018.⁴² The Withdrawal Agreement contains a ‘Transitional period’ until 31 December 2020, during which the *acquis communautaire*⁴³ remains in place.

5.2 Early priorities

Policymakers interviewed one month after the start of the negotiations, in July 2017 (hereafter referred to as ‘participants’) identified key priorities for the coordination of social security to be resolved in the first phase. As the first phase of the negotiations was concerned with the terms of the UK’s departure from the EU, the negotiators would have to guarantee the rights of people who had already exercised their right to move between the UK and other member countries, when the UK leaves, which at the time of the 2017 interviews was scheduled to be 31 March 2019. The hope expressed by participants in 2017 was that new social security arrangements would include the same people and risks covered by the current Coordinating Regulations. However, the first priority was to guarantee pension and healthcare rights:

³⁶Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom’s orderly withdrawal from the European Union: TF50 (2017) 19—Commission to EU 27, 8.1.2018.

³⁷*European Council* [13].

³⁸European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community: TF50 (2018) 33—Commission to EU 27, 28.2.2018.

³⁹Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community highlighting the progress made (coloured version) in the negotiation round with the UK of 16–19 March 2018, TF50 (2018) 35—Commission to EU27.

⁴⁰Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators’ level on 14.11.2018.

⁴¹Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom 22 November 2018.

⁴²*European Council* [14].

⁴³“The EU’s ‘acquis’ is the body of common rights and obligations that are binding on all EU countries, as EU Members.” EUR-Lex: <https://eur-lex.europa.eu/summary/glossary/acquis.html>.

“... if we can make a wish list, of course we would want everything to stay as it is even after the UK ... is outside of the European Union ... but then if you have to start making a list ... then acquiring pension rights is of course top on the list, and healthcare rights ...” (Finland, 2017).⁴⁴

Two years later, in July 2019, the Polish participant recalled:

“we were asked by our Ministry of Foreign Affairs to prepare ... analysis from the very optimistic scenario of what we would like to obtain, ... to the minimum scenario and, for example, from our point of view the most optimistic was maintaining all principles, all risks, all benefits from the basic regulation.” (Poland, 2019).

Safeguarding the rights of people who had already exercised their right to move freely to or from the UK when the UK leaves, includes rights that have already been acquired, rights in the course of acquisition, and entitlements that mature in the future. The long life span of pensions, which might not be payable until decades into the future, presents challenges for the two-phase negotiation design that attempts to draw a line between past and future rights:

“It is very difficult to set the borderline as many aspects of the elements of the past reach into the future” (Austria, 2017).⁴⁵

5.3 What was agreed during the first phase of negotiations?

The first phase of Brexit negotiations took six rounds of discussion over as many months before, on Friday 8 December 2017, an agreement was reached in principle on the three priority areas. Coordination of social security is included in the Agreement, within Part Two of Title III.⁴⁶ The personal scope of the Withdrawal Agreement includes:

- Union citizens within the personal scope of Regulation (EC) No 883/2004 who at the end of the Transition period are or have been subject to the legislation of an EU27 Member State for UK nationals, or UK legislation for EU27 citizens, and their family members and survivors
- EU27 and UK nationals within the personal scope of the Agreement by virtue of residence, and their family members and survivors
- Stateless persons, refugees, and nationals of third countries who fulfil the conditions of Council Regulation (EC) No 859/2003, in analogous situations as well as their family members and survivors⁴⁷

⁴⁴ Roberts [39].

⁴⁵ Roberts [39].

⁴⁶ Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level on 14 November 2018.

⁴⁷ Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality, OJ L 124, 20.5.2003, p. 1–3; Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level on 14 November 2018.

All benefits referred to in Regulation (EC) No 883/2004 are included in the Withdrawal Agreement, with lifetime export under the conditions of that Regulation, including lifetime export of uprated pensions. Rules for healthcare would follow Regulations (EC) No 883/2004 and 987/2009.

The UK will take part in the Electronic Exchange of Social Security Information (EESSI)⁴⁸ and bear the related costs. Art 34 provides for the UK to have Observer status in the Administrative Commission⁴⁹ where the items on the agenda are relevant. Where the Regulations are amended or replaced after the end of the Transition period the EU will inform the UK within a Joint Committee; and vice versa the UK will inform EU of changes to domestic provisions of relevance to the Agreement (Art 36).⁵⁰ To maintain consistent interpretation and application, Art 158 provides that, in a case which has commenced at first instance within eight years from the end of the Transition period, a UK court or tribunal may request the CJEU to give a preliminary ruling on a question.⁵¹

It would appear that the full wish list expressed by participants at the start of the negotiations in 2017 had been delivered. The Finnish participant commented in July 2019:

“Social security coordination is covered in the Withdrawal Agreement so in that respect we achieved what was in Finland’s interests, which was the common interest of all of the countries including the UK, all of who wanted social security included, so *in that respect* our original aims have been achieved.” (Finland, 2019).

However, while social security coordination has been incorporated into the Withdrawal Agreement,⁵² the procedure for identifying eligibility is complicated. This is because the condition for being included in the personal scope of the Withdrawal Agreement⁵³ is that the person must continue *without interruption* to be in one of the qualifying situations. For example, an EU citizen who is residing in the UK at the end

⁴⁸“EESSI is an IT system that helps social security institutions across the EU exchange information more rapidly and securely, as required by the EU rules on social security coordination”. <https://ec.europa.eu/social/main.jsp?catId=869>.

⁴⁹“The Administrative Commission for the coordination of social security systems comprises a representative of the government of each EU country and a representative of the Commission. It is responsible for dealing with administrative matters, questions of interpretation arising from the provisions of regulations on social security coordination, and for promoting and developing collaboration between EU countries”. <https://ec.europa.eu/social/main.jsp?catId=857&langId=en&intPageId=983>.

⁵⁰Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators’ level on 14 November 2018.

⁵¹Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators’ level on 14 November 2018.

⁵²Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators’ level on 14 November 2018.

⁵³Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators’ level on 14 November 2018.

of the Transition period and continues residing there would be covered by Regulation 883/2004. However, if she moved to the UK the day after the end of the Transition period she would not be covered but she might be covered again if, for example, later on she claimed a pension. This makes the social security coordination envisaged in the Withdrawal Agreement less comprehensive and far more complicated compared to the current Coordination Regulations.

“I think we as member states would have preferred to have a very simple text, for example, the Regulation continues to apply to all cases which have been covered before ... but the approach of the Withdrawal Agreement is different—the Regulation does not continue to apply to all cases. There are groups of persons to whom this Agreement applies and for these persons some aspects of the Regulation continue to apply. It is quite a difficult issue to filter out the cases which are covered by the Withdrawal Agreement from those that fall outside.” (Austria 2018).

At the beginning of the Withdrawal negotiations in 2017, the Austrian participant had expressed his concern that, as it was not possible for social security experts to participate at all times when social security issues are being discussed, “it is not safeguarded that all relevant aspects are taken on board during these negotiations compared to negotiations directly involving the social security experts of the Member States.” (Austria 2017).⁵⁴

By 2018, his concerns appeared to have been founded. The negotiations

“got right to the wire and therefore you’ve got no time to discuss or think about the consequences of what this means in the future... there are some questions being raised on some aspects, not that what is written there is wrong, it is trying to understand what it actually meant. Where it could have different meanings so there is some behind the scenes work going on ... some clarification is still being sought.” (UK 2018).

6 What the future may hold

At the time of writing (September 2019), the UK’s future relationship with the EU is unknown. The then Prime Minister, Theresa May, had stated she would to put the Withdrawal Agreement⁵⁵ to Parliament on 11 December 2018 but delayed at the last minute because she feared heavy defeat. The Agreement was eventually put to House of Commons on 15 January 2019 when MPs voted overwhelmingly, by 432 votes to 202, to reject it—the largest defeat for a Government in UK parliamentary history. The Government put the bill back to Parliament on two further occasions, on 12 and 29 March—the day the UK was scheduled to leave the EU—when it was

⁵⁴Roberts [39].

⁵⁵Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators’ level on 14 November 2018.

again decisively rejected.⁵⁶ The caveat to the Withdrawal Agreement is that “Nothing is agreed until everything is agreed”. The rejection of the Withdrawal Agreement by the UK Parliament means that nothing is agreed for post-Brexit social security and healthcare coordination.

The 26-page Political Declaration setting out the Framework for the future relationship contains only a brief statement of intent on mobility that notes that because the UK has decided that the principle of free movement of persons between the EU and the UK will no longer apply, the Parties should establish mobility arrangements based on non-discrimination and full reciprocity. There is only one sentence on post-Brexit social security and healthcare rights to the effect that “The Parties also agree to consider addressing social security coordination in the light of future movement of persons.”⁵⁷

Various scenarios and analogies have been identified for the future relationship between the UK and the EU, including UK membership of the Single Market, the ‘Swiss model’ based upon numerous bilateral agreements, participation in a customs union only, and leaving without a deal.⁵⁸ These scenarios have different implications for social security. Remaining in the Single Market would imply the UK remains within coordination provided by Regulation (EC) No 883/04⁵⁹ and No 987/09.⁶⁰ Switzerland is also within social security coordination. While a customs union or No deal outcome imply new arrangements would be necessary. These new arrangements are likely to be either a series of bilateral agreements with individual member countries or a multilateral agreement with the EU.

The UK participant said in 2018:

“We are not sure that we would want 883 as it is now, in the future arrangement, we would want elements of that but then you can’t pick or choose what bits of 883 you want so you have to have another separate arrangement so one option is a multilateral agreement between the UK and the EU or (look at) the individual bilateral agreement we have.” (UK 2018).

⁵⁶<https://www.parliament.uk/business/news/2019/march/mps-debate-and-vote-on-the-withdrawal-agreement-with-the-european-union/>.

⁵⁷ Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom 22 November 2018.

⁵⁸ *Dhingra/Sampson* [5], February 2016; *Frimston* [16], Chatham House, 5 August 2016, <https://www.chathamhouse.org/publications/twt/preparing-uks-brexite-negotiation#sthash.fbmvyony.dpuf> (retrieved 20.03.2017); *Peel* [35], <https://www.chathamhouse.org/publications/twt/britain-s-new-global-role-after-brexite> (retrieved 20.03.2017); *Emerson* [9], Which model for Brexit?, No 147/October 2016, CEPS Special Report: Thinking ahead for Europe, <http://ec.europa.eu/justice/citizen/> (retrieved 20.03.2017); *H.M. Government* [19], March, HMSO, London 2016; *Roberts* [40].

⁵⁹ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems; OJ L 166, 30.4.2004.

⁶⁰ Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems OJ L 284/1 30.10.2009.

6.1 Bilateral agreements

The UK has bilateral social security agreements with all the pre-2004 EU countries except Greece and Liechtenstein—and Cyprus and Malta of the post 2004 member countries as well ex-Yugoslavia. For EU nationals, bilateral agreements between member countries are largely redundant, having been superseded by the Coordinating Regulations, although these were retained as some of UK territory not part of EU free movement provisions, for example, Isle of Man, Jersey, Guernsey.⁶¹ The legal status of these old bilateral agreements is unclear:

“Of course, we have an old bilateral agreement with the United Kingdom but nobody knows if it continues, if it is becoming applicable again or not. The Commission usually rejects continued effects of old bilateral Agreements with the UK, because from the moment EU legislation was applicable and the old Agreement was replaced by the Regulation it can’t be brought to life again. We’ve already had some contact with our UK partners and they also said they don’t know.” (Austria, 2018).

“... we have never had bottomed out the legal advice on the status of those agreements” (UK 2018).

Examination of the UK’s bilateral agreements with what are now EU member countries shows that while all agreements include equal treatment, whom that equal treatment applies to and the risks and benefits included varies from agreement to agreement, thus providing variable and incomplete coverage.⁶²

“the provisions are so out dated ... they would not be able to work” (UK2018).

The statement in the Political Declaration Setting Out The Framework For The Future Relationship⁶³ that the *“The Parties also agree to consider addressing social security coordination in the light of future movement of persons”* would require the UK to take account of the increasingly fluid EU labour markets. A significant limitation of bilateral agreements in the context of a future UK-EU relationship is that they coordinate the social security and healthcare systems of two countries only. Mobile workers between a post-Brexit UK and the EU may well have a work biography that takes them to the UK and two or more EU countries. Uncoordinated bilateral agreements are likely to leave gaps in their social security and healthcare coverage.

“I think everybody is striving for a multilateral agreement ... I don’t think any administration in any member state wants separate bilateral arrangements ... This wouldn’t be in the interests of any of the countries in the end It would be chaotic.” (Finland, 2019).

⁶¹ Information on UK bilateral agreements presented in this paragraph was provided by Derek Coulthard on 21/02/2017.

⁶² Roberts [42].

⁶³ Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, 22 November 2018.

6.2 A multilateral agreement

Although the then UK Prime Minister, Theresa May, had said that “*We do not seek to adopt a model already enjoyed by other countries*”,⁶⁴ a ‘bespoke’ UK approach to protect the rights of workers and citizens moving between the UK and the EU, whether bilateral or multilateral, would need to be based on the principles and mechanisms that have been developed to protect the social security and healthcare rights of migrant workers since the beginning of the 20th century.⁶⁵ The Coordinating Regulations, developed and refined over 60 years, provide the most comprehensive and effective social security and healthcare coverage for mobile workers anywhere in the world. This may be what the House of Commons ‘Select Committee European Scrutiny’ had in mind when, on 8 February 2017, it advised the UK Government, with reference to a ‘Proposal for a Regulation amending Regulation (EC) No 883/2004’, that:

“If the amended version of Regulation 883/2004 could potentially form the basis for a future bilateral UK-EU agreement on the coordination of social security, the Government should participate fully in the negotiations to ensure the final legislation is aligned with the UK’s priorities.”⁶⁶

The Finnish participant commented:

“I think the UK’s continuing interest in the future development of coordination, even though they are leaving, shows that there is understanding in the UK that in one form or another they would be willing to apply these rules in the future and while they are still members want to influence them.” (Finland, 2019).

However, interviewed in 2018, the UK participant said:

“There’s lots of options but one of them is you don’t look at Regulation 883 and you have a bespoke coordination arrangement with the EU As to what you contain in that agreement ... I imagine we would only want to cover some contributory benefits ... so an ... agreement (that) provides for aggregation of contributions ... I doubt we would have an agreement which is as extensive as 883, even on a bilateral basis” (UK 2018).

6.3 No deal

In the absence of a withdrawal agreement or a further extension of the negotiating period, EU law on social security coordination will cease to apply in the UK on exit day. In order to mitigate the impact of this scenario, the UK and the EU have drawn up separate legislation. The UK’s European Union (Withdrawal) Act 2018⁶⁷ converts

⁶⁴Theresa May, 17 January 2017: <https://www.politicshome.com/news/uk/political-parties/conservative-party/theresa-may/news/82440/live-theresa-mays-speech-brexite>.

⁶⁵Holloway [22]; Watson [46]; Cornelissen [4]; Roberts [41].

⁶⁶House of Commons [23], <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmeuleg/71-xxix/7111.htm>.

⁶⁷European Union (Withdrawal) Act 2018.

EU law into a body of ‘retained’ UK law. The UK has introduced further legislation to “maintain the status quo on a unilateral basis, ensuring that citizens’ rights are protected as far as possible in a ‘no deal’ scenario in relation to social security.”⁶⁸ However, social security coordination is based on the principle of reciprocity and operationalised through the principle of ‘sincere cooperation’⁶⁹ and cannot be coordinated on a unilateral basis. Without further multilateral or bilateral agreements, there will be no legal basis for reciprocity or sincere cooperation following the UK’s withdrawal. This will mean there is no framework for EU institutions to share information, including insurance contribution records, with the UK. Thus, a person applying for a UK pension will need to provide evidence of insurance periods in an EU country, themselves. Furthermore, without the Coordinating Regulations, UK nationals working in an EU country and residents of an EU country working in the UK may find themselves required to pay double social insurance contributions, in both the UK and in an EU Member State. In the absence of reciprocity and sincere cooperation, the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019 provides for broad powers for the UK to pay for healthcare in another country and negotiate new bilateral agreements with individual Member States to try to provide healthcare coverage for UK citizens in the EU.⁷⁰

The EU has put in place Contingency Regulation to ensure a minimum of protection in case of a No deal Brexit. Regulation 2019/500⁷¹ seeks to ensure that periods worked by an EU citizen in the UK or a UK citizen in the EU before Brexit, will be recognized after Brexit:

“To achieve the aim of safeguarding social security entitlements for the persons concerned, Member States should continue applying the Union principles of equality of treatment, assimilation and aggregation as laid down by Regulations (EC) No 883/2004 and (EC) No 987/2009, as well as the rules of those Regulations that are necessary to give effect to those principles, as regards persons covered, facts or events that occurred, and periods that were completed prior to the withdrawal of the United Kingdom from the Union.”⁷²

⁶⁸The Social Security Coordination (Regulation (EC) No 883/2004, EEA Agreement and Swiss Agreement) (Amendment) (EU Exit) Regulations 2019 SI 2019 No 722; The Social Security Coordination (Regulation (EC) No 987/2009, EEA Agreement and Swiss Agreement) (Amendment) (EU Exit) Regulations 2019 SI 2019 No 723.

⁶⁹Art 4 (3) TFEU: “Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.” Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 202/1, 07.06.2016.

⁷⁰The Healthcare (European Economic Area and Switzerland Arrangements) Act 2019 provides powers to implement new bilateral agreements with individual Member States from 29 March 2019.

⁷¹Regulation (EU) 2019/500 of the European Parliament and of the Council of 25 March 2019 establishing contingency measures in the field of social security coordination following the withdrawal of the United Kingdom from the Union OJ L 85I, 27.3.2019.

⁷²Regulation (EU) 2019/500 of the European Parliament and of the Council of 25 March 2019 establishing contingency measures in the field of social security coordination following the withdrawal of the United Kingdom from the Union OJ L 85I, 27.3.2019.

Regulation 2019/500⁷³ “does not affect any competence of either the Union or the Member States to conclude social security conventions and agreements with third countries or with the United Kingdom that cover the period after the day on which the Treaties cease to apply to the United Kingdom.”⁷⁴ Therefore, in addition to the Contingency Regulation 2019/500,⁷⁵ some Member States are also putting in place unilateral contingency measures at national level for the period after withdrawal and examining the future arrangements with the UK in the event of a No deal Brexit.

The Austrian participant noted that: “To build something totally new from scratch would take a long time.” In the event of a No deal Brexit, Austria would therefore discuss the feasibility of applying the old bilateral agreement with the UK “because this would provide aggregation, export of pensions and necessary hospital treatment, so at least the most urgent cases would be covered.” (Austria, 2018). The UK participant considered that, although the provisions of the old bilateral agreements with other EU countries are out dated and would not be able to work, “having an old agreement, it is possible to update that agreement.” (UK 2018).

At the time of the interview in July 2019, Polish officials were about to meet UK officials to discuss a Memorandum of Understanding in case of a No deal scenario. The Polish participant made it clear these were not negotiations about a bilateral agreement because the EU currently maintains competence. However, in the event of a No deal Brexit, protection for Poland’s 900,000 citizens in the UK is a high priority for the Polish Government:

“we would like to copy provisions from the 883 and 987 because it would be a continuation somehow . . . (it) is very important to avoid a legal gap because at the end of all of our discussions, of our work, are ordinary citizens with problems, with their children, parents with all insurance risks.” (Poland, 2019).

7 Conclusion: different visions of Europe

The UK’s decision to leave the EU is a hugely disruptive act, which after 46 years’ membership has been likened to trying to take an egg out of an omelette. The disruption is causing deep uncertainty for UK and EU-27 citizens who have made their homes in the EU-27 and the UK respectively. The rejection of the Withdrawal Agreement means that citizens who have exercised their right to free movement in the reasonable expectation that their rights were guaranteed now find themselves potentially without healthcare, pensions and protection in the case of sickness, disability, maternity, unemployment and support for costs of raising children. The Withdrawal

⁷³Regulation (EU) 2019/500 of the European Parliament and of the Council of 25 March 2019 establishing contingency measures in the field of social security coordination following the withdrawal of the United Kingdom from the Union OJ L 85I, 27.3.2019.

⁷⁴Regulation (EU) 2019/500 of the European Parliament and of the Council of 25 March 2019 establishing contingency measures in the field of social security coordination following the withdrawal of the United Kingdom from the Union OJ L 85I, 27.3.2019.

⁷⁵Regulation (EU) 2019/500 of the European Parliament and of the Council of 25 March 2019 establishing contingency measures in the field of social security coordination following the withdrawal of the United Kingdom from the Union OJ L 85I, 27.3.2019.

Agreement, if ratified, would provide protection for those people who have already exercised their right to free movement and are covered by the Coordinating Regulations at the end of the Transition period but will not provide social security for future movers between the UK and EU. Participants from the EU-27 favoured future arrangements, whether bilateral or multilateral, that mirror the current Coordinating Regulations, which they considered provide the most comprehensive and effective social protection for mobile workers and citizens in the world today. However, the UK would want a much less comprehensive model covering only some contributory benefits. The difference is a microcosm of different visions of 'Europe' between those who see it solely as a labour market to serve economic needs and those with a broader vision that includes a space where European citizens can create opportunities to expand their horizons.

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